In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 411

AMINO BROTHERS COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, which contracted with the Army Corps of Engineers to perform certain work on a flood control project at Salina, Kansas, brought this suit to recover for materials lost and delays incurred when high waters in the Smoky Hill River twice washed out a low-water crossing it had constructed. Petitioner charged that the United States was liable for such damages because its release of waters at the Kanopolis Dam, 88 miles above Salina, had caused the washouts of the crossings. The Contracting Officer, the Corps of Engineers Board of Contract Appeals, and the Court of Claims rejected petitioner's claim. The Board of Contract Appeals found that the first of the two washouts, which occurred on May 17, 1957, had not been caused by the release of water

at the Kanopolis Dam, but rather by natural drainage in the area between that dam and Salina, resulting from heavy rainfall (Pet. App. A57–A59; see *id.* at A43). The Board also found (Pet. App. A74) that petitioner should have anticipated that high river stages might occur, and therefore that it could not recover for the first washout. Petitioner apparently does not challenge this ruling.

With regard to the second washout, which occurred on September 19, 1957, the Board found that its cause had been the release of waters at the Kanopolis Dam. At the time the order was given to release flood waters which had backed up at the dam, the government official at the dam was under the erroneous impression that the crossing already had again been completely destroyed by natural flow (it had been only partially destroyed). However, upon learning of the error in this respect, the official determined that the release had nevertheless been necessary, and did not rescind the order, since the waters at the dam were so high that evacuation of flood water was necessary in the interests of flood control (Pet. App. A42; see *id.* at A60). The waters discharged at that time were in fact accumulated flood waters and the discharge was in accordance with government regulations (Pet. App. A67). A disastrous flood had occurred in the area only six years before (Pet. App. A44), and release of the flood waters was necessary "for the protection of the dam and life and property downstream" (Pet. App. A42).[1]

[1] Several weeks after the second washout, petitioner was able to rebuild the crossing again, and proceed to complete its work

The holding below that the government was not liable to the downstream contractor for the operation of a reservoir for flood control purposes is clearly correct, and further review is not warranted. There is no basis for assuming that the Corps of Engineers undertakes to pay a government contractor for damage stemming from the normal and proper carrying out of public functions, such as flood control operations.[2] To the contrary, as the Board stated (Pet. App. A73), petitioner "expected or should have expected that the reservoir would be operated for the purpose of controlling floods * * *." The present contract was drawn against a background of a rule of more than 100 years' standing—that the government is not liable to its contractors for public acts which incidentally impede their work.[3] No provision was inserted in the instant contract to negate that rule[4] and

---

under the contract. Various modification orders gave petitioner "additional time within which to finish the contract without having to pay any liquidated damages * * *" (Pet. App. A42).

[2] The decision of the Commissioner (Pet. App. A1–A33), which was rejected by the Court of Claims (Pet. App. A34–A47), but upon which petitioner heavily relies, was based largely on the Commissioner's view (Pet. App. A11) that the releases of water in September 1957 "were tantamount to inadvertent, improper or unwarranted releases." However, the Board of Contract Appeals found otherwise (Pet. App. A36, A43). Its findings were supported by substantial evidence, and hence binding under the disputes clause. *United States* v. *Utah Construction Co.*, 384 U.S. 394; *United States* v. *Anthony Grace & Sons*, 384 U.S. 424.

[3] *E.g.*, *Horowitz* v. *United States*, 267 U.S. 458; *Deming* v. *United States*, 1 Ct. Cl. 190 (1865); *Jones* v. *United States*, 1 Ct. Cl. 383 (1865); *Wunderlich Contracting Co.* v. *United States*, 351 F. 2d 956, 967 (Ct. Cl.).

[4] Compare *Gerhardt F. Meyne Co.* v. *United States*, 76 F. Supp. 811, 815 (Ct. Cl.).

provide for payment to the contractor for delays or damages caused by governmental acts for the public benefit which should reasonably be anticipated. It is plain, therefore, that the government did not expressly agree to be liable in such circumstances (*e.g., United States* v. *Utah Construction Co.*, 384 U.S. 394, 404–407), and that no contractual undertaking in this regard should be implied (see Pet. App. A45–A46).

Moreover, another independent reason supports the finding of government non-liability in the instant case. Congress has explicitly provided, in 33 U.S.C. 702c, that: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." Cf. *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967. Had the court below found it necessary to reach the question, that statutory provision would presumably, in any event, have been controlling here. Thus, petitioner's suit was properly dismissed by the Court of Claims, and no question warranting review by this Court is presented.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967